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No. 97-1666

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KEVIN E. BRYAN and RENEE M. BRYAN,
Petitioners,

v.

KENNETH M. CLAYTON and
NEAL McCULLOUGH, individually and d/b/a
CLAYTON & McCULLOUGH, a Florida general partnership,
Respondents.

On Petition for Writ of Certiorari To The State of Florida Fifth District Court of Appeal

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONERS

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The American Association of Retired Persons (AARP), the National Association of Consumer Advocates (NACA), the National Consumer Law Center (the Center), and the Consumer Federation of America (CFA), respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Bryans' Petition for a Writ of *Certiorari* from the judgment of the Florida Fifth District Court of Appeal.

Pursuant to Supreme Court Rule 37.2, consent of the parties to the filing of the brief was sought through counsel. Counsel for Petitioners gave consent, but counsel for Respondents declined to do so.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a non-profit membership organization of persons aged 50 and older, approximately 2.3 million of whom live in Florida. As the largest membership organization serving older Americans, AARP supports effective consumer protection at the federal, state, and local levels to safeguard consumers against fraud, deception, and unfair practices. AARP also recognizes the importance of a consumer's ability to challenge violations of these laws and encourages consumer participation in the judicial process to pursue these challenges. AARP supports vigorous enforcement of the Fair Debt Collection Practices Act (FDCPA), and other federal consumer credit acts, including the Equal Credit Opportunity Act, the Fair Credit Billing Act, and the Fair Credit Reporting Act.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country, and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices.

Prevention of debt collection abuse has been a continuing focus of NACA since its inception. Protection of the unsophisticated consumers for whose benefit Congress adopted the FDCPA is NACA's ultimate goal, both within the debt collection field as well as the larger arena of the consumer rights movement. To that end, NACA has appeared as an *amicus curiae* before this Court on several occasions, including in its only FDCPA case to date, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (joined by *amici* AARP and the National Consumer Law Center).

The National Consumer Law Center, Inc. (the Center) is a non-profit corporation established in 1969 to carry out research, education, and litigation regarding significant consumer law issues. The Center has as one of its primary objectives the provision of assistance to attorneys in advancing the interests of their low-income clients in the area of consumer law.

The Center's activities have included research and providing expertise on consumer law for legal services and private attorneys, the Congress of the United States, state legislatures, and state and local offices charged with the enforcement of consumer protection acts; participation as counsel, co-counsel and *amicus curiae* throughout the country; and sponsorship of and participation in conferences designed to provide continuing education for legal services

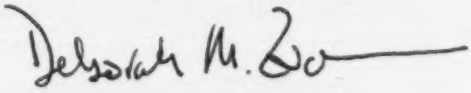
and private attorneys. The FDCPA is a major focus of the Center's work. The Center publishes Fair Debt Collection (2d ed. 1989 & 1994 Supp.), a treatise of more than 800 pages, to assist attorneys who deal with consumer debt collection problems. In addition, the Center has directly assisted attorneys in scores of cases arising under the FDCPA. The Center was active in the passage of the FDCPA, testifying at hearings and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs. Many provisions of the Center's Model Consumer Credit Code were used in the FDCPA. The Center's article on attorney coverage under the FDCPA was cited as authoritative in *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

The Consumer Federation of America (CFA) is a non-profit association founded in 1968 to advance the interests of consumers through advocacy and education. CFA's membership is comprised of approximately 240 national, state, and local consumer groups which, in turn, represent more than 50 million consumers. CFA participates in various forums aimed at securing and preserving adequate legal remedies for consumers, including redress under the FDCPA.

The interest of *amici* in this case stems from their positions as among the leading and most active consumer organizations in this country and their particular involvement, past and present, in matters concerning enforcement of the FDCPA. *Amici* respectfully suggest that it will be useful to the Court,

in reviewing the Petition for Writ of *Certiorari*, to consider their views about the importance of resolving the split in authority created by the Florida appellate court's ruling.

Respectfully submitted,



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STATEMENT OF INTEREST OF *AMICI CURIAE*[1/]

The interest of *amici* is set forth in the preceding Motion for Leave to File this brief.

REASONS FOR GRANTING THE WRIT

When it enacted the Fair Debt Collection Practices Act (FDCPA, or, the Act), 15 U.S.C.A. §§ 1692-1692o (West 1998), Congress found "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors." § 1692(a). The detailed allegations of Respondents' misrepresentations, debt padding, imposition of illusory and illegal additional charges, and extortionate collection practices show that such tactics still are being used twenty years later. The sole issue presented now is whether this misconduct is excused, not because of any claim of innocence, but because of the FDCPA's purported lack of coverage.

Congress intended that "every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (citation and quotations omitted); *see also Heintz v. Jenkins*, 514 U.S. 291, 292-93 (1995). Congress expressly added the FDCPA to the Consumer Credit Protection Act (CCPA) because of the inadequacy of existing remedies for redressing the substantial injuries to consumers caused by these unsavory practices, as well as the competitive disadvantage suffered by honest and ethical debt collectors. § 1692(a), (b) and (e).

The decision below, *Bryan v. Clayton*, 698 So. 2d 1236 (Fla. Dist. Ct. App. 1997), places citizens of the State of

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[1/] No counsel for any party authored any portion of this brief. No person or entity other than *amici*, their members, or their counsel has made a monetary contribution to the preparation and submission of this brief.

Florida in a unique position as the only consumers in the country who are not afforded the protections intended by Congress under the circumstances of this case. Relying on now-discredited *dictum* from an early Third Circuit FDCPA decision, and on federal district court decisions which adopted that *dictum* without analysis, and apparently with no awareness of its fatal flaw, the court below held that collection of condominium and homeowner association dues and assessments falls outside the Act's intentionally broad definition of a "debt" subject to its coverage. § 1692(a)(5). Five federal Courts of Appeal have rejected that *dictum*, and no federal Court of Appeal has adopted it. Accordingly, *amici* urge this Court to grant a writ of *certiorari* in order to restore uniformity of interpretation and application of the FDCPA.

I. THE LOWER COURT'S EXPLICIT REFUSAL TO APPLY THE PLAIN LANGUAGE OF THE ACT IS ERRONEOUS AND EXPLAINS ITS DEPARTURE FROM THE UNANIMOUS TEACHING OF THE FEDERAL COURTS OF APPEAL.

The lower court expressly refused to apply the plain language of the Act's definition of a covered "debt." *Bryan*, 698 So. 2d at 1237. This Court has consistently held that the plain language textual analysis is mandatory and dispositive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). Indeed, in its only FDCPA decision to date, this Court unanimously resolved a similar coverage issue created by an identical lop-sided split of lower appellate court authority on the basis of the "ordinary English" meaning of a defined term. *Heintz*, 514 U.S. at 294. The lower court's jurisprudential error is patent.

Had it examined the statutory definition, the lower court would have had to agree with the compelling analysis of *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997), and to reach the same conclusion as the Seventh Circuit that a "debt" under the FDCPA contains no underlying credit requirement. Five federal Courts of Appeal, all within the last year, have rejected the *dictum* in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3d Cir. 1987), relied on by the court below, that

> the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer.

Each Court examined the plain language of the FDCPA and found no support for that *dictum*.[2/]

No federal court which has examined *Zimmerman* or which has performed any analysis has found it persuasive or adopted it. The earlier district court cases which held that the FDCPA requires a credit transaction merely parroted its *dictum*. The decision presented here stands alone as the only appellate case, albeit from a state appellate court, and the only

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[2/] In addition to the Seventh, Ninth, and Eleventh Circuit decisions cited by Petitioners, *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir.), *cert. denied*, 118 S. Ct. 298 (1997); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997); *Charles v. Lundgren & Assocs.*, 119 F.3d 739 (9th Cir.), *cert. denied sub nom. Checkrite Ltd. v. Charles*, 118 S. Ct. 627 (1997); and *Brown v. Budget Rent-A-Car Systs., Inc.*, 119 F.3d 922 (11th Cir. 1997), the Eighth and Tenth Circuits recently joined this unbroken line of Circuit Courts in rejecting the *Zimmerman dictum*. *See Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998); *Snow v. Riddle*, 1998 WL 233383 (10th Cir. May 11, 1998).

case decided in the last year having the benefit of *Bass* and its progeny, to adhere to the now-discredited credit requirement that has no support in the statutory language. The Florida judiciary's divergence from the uniform holdings of the federal Courts of Appeal merits the attention of this Court and meets the exacting standard for granting a writ of *certiorari* established by Rule 10 of this Court.

II. THE LOWER COURT'S ALTERNATIVE HOLDING AS TO THE ABSENCE OF A CONSUMER PURPOSE IS INSUPPORTABLE.

The lower court's alternative holding that the obligation to pay fees associated with maintaining Petitioners' residence does not arise "primarily for personal, family, or household purposes," § 1692a(5), is spurious. First, and most importantly for establishing the split of authority necessary to grant a writ of *certiorari*, this holding is diametrically opposed to the holding of the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), as incisively discussed by Petitioners. (Pet., § I, at 7-14.) The lower court's summary rejection "of the decision of the learned panel of the federal appeals court," *Bryan*, 698 So. 2d at 1237, is fundamentally insupportable.

In addition, the court's stark refusal to apply the consumer purpose standard to the prototypical consumer aspiration of home ownership necessarily rejects much of the CCPA, throughout which the "personal, family, or household purposes" language is a recurring theme, *see* Truth in Lending Act (TILA), 15 U.S.C.A. § 1602(h) (West 1998), Consumer Leasing Act, 15 U.S.C.A. § 1667(1) (West 1998), and Credit Repair Organizations Act, 15 U.S.C.A. § 1679a(2) (West 1998), as well as other federal consumer protection laws employing the same criterion. *See, e.g.*, Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301(1) (West 1998). This consumer purpose language distinguishes such personal, family, and household uses from commercial and

agricultural purposes. *First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133, 135-36 (5th Cir. 1995) (FDCPA); *Bloom v. I.C. Syst., Inc.*, 972 F.2d 1067, 1068-69 (9th Cir. 1992) (FDCPA); *Munk v. Federal Land Bank*, 791 F.2d 130, 131-32 (10th Cir. 1986) (*per curiam*) (FDCPA). Indeed, within the range of transactions generally dealing with consumer purposes, Congress has granted special rights and protections when a person's residence is at stake. *See* 15 U.S.C.A. §§ 1635, 1639 (West 1998). Home ownership is the quintessential consumer purpose, and the lower court's treatment of this question is indefensible.

This Court stated eighteen years ago, in the context of the CCPA, that the judiciary is ill-equipped to substitute its judgment through statutory interpretation for the legislative decisions made by Congress: "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (TILA). The danger of such judicial activism is illustrated here, where the court below departed from the statutory language and the canons of statutory construction to reach a conclusion replacing the judgment of Congress with its view of how the FDCPA (and necessarily the remainder of the CCPA) should operate. The holding that home ownership is not a consumer purpose (as well as imposing the condition that a "debt" is limited to credit obligations) highlights one of the practical reasons that this Court warned in *Milhollin* against creative judicial statutory interpretation. The lower court's view of the Act was necessarily limited to the claim before it. Therefore, it did not consider, let alone evaluate, the adverse impact that its erroneous departure from the statutory language would have on the interdependent provisions of other titles of the CCPA.

III. THE DECISION BELOW NECESSARILY WILL PROMOTE FORUM SHOPPING TO AVOID ITS RESTRICTIVE HOLDING.

Congress granted concurrent jurisdiction to federal and state courts to enforce the FDCPA. § 1692k(d). The natural effect of the decision below, however, will be to discourage plaintiffs from filing any further FDCPA suits in the Florida state courts where the scope of the definition of a "debt" might be at issue. This result is particularly likely since the Eleventh Circuit, which includes Florida within its jurisdiction, is one of the five federal Courts of Appeal which have authoritatively rejected the state court's credit-based rationale, *Brown v. Budget Rent-A-Car Systs., Inc.*, 119 F.3d 922 (11th Cir. 1997), and, as all other federal courts have done, recognizes home ownership as a consumer purpose. *Tower v. Moss*, 625 F.2d 1161, 1165-67 (5th Cir. 1980) (TILA).[3/]

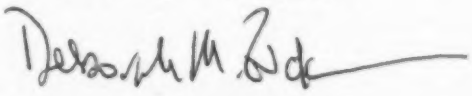
This Court has described as "mischievous" the ability to vary the outcome of a case through forum selection." *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938). However, it will be difficult to fault Florida consumers and their attorneys for engaging in such forum shopping in view of the current rift between the Florida judiciary and the Eleventh Circuit on this matter of federal statutory interpretation. The solution is the one contemplated by the Supremacy Clause of the Constitution: the exercise by this Court of its *certiorari* authority to bring this state decision into conformity with federal case law.

[3/] Decisions of the former Fifth Circuit decided before October 1, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

CONCLUSION

Amici respectfully urge this Court to grant the writ of *certiorari* to correct this misguided result and to resolve the split of authority between the Florida court and the federal Circuits on this important question of national policy and federal statutory construction.

Respectfully submitted,



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